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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

NAVNEET SHARDA, M.D., an individual Plaintiff, vs. SUNRISE HOSPITAL AND MEDICAL CENTER, LLC, a foreign limited liability company; THE BOARD OF TRUSTEES OF SUNRISE HOSPITAL; SUSAN REISINGER, an individual; DIPAK DESAI, an individual; NEVADA STATE BOARD OF MEDICAL EXAMINERS; KATHERINE KEELEY, an individual; DOE Individuals I through X; and ROE CORPORATIONS and ORGANIZATIONS I through X, inclusive. Defendants.	Case No.: 2:16-cv-02233-JCM-GWF **OPPOSITION TO MOTION TO DISMISS FIRST AMENDED COMPLAINT**

COMES NOW, Plaintiff, NAVNEET SHARDA, M.D (hereafter “Sharda”), by and through his attorneys, the LAW OFFICES OF P. STERLING KERR, and hereby Opposes SUNRISE HOSPITAL AND MEDICAL CENTER, LLC; THE BOARD OF TRUSTEES OF SUNRISE HOSPITAL; SUSAN REISINGER; and KATHERINE KEELEY’S MOTION TO DISMISS FIRST AMENDED COMPLAINT.

I. INTRODUCTION

The crux of Plaintiff's actions against the enumerated defendants is simple: the defendants have worked together in the preceding years to deprive a medical practitioner of his ability to earn a living by abusing their powers. Sharda's Amended Complaint, drafted without the benefit of discovery, seeks to uncover a scheme directly targeting medical practitioners such as himself. In response, Moving Defendants have filed their Motion to Dismiss invoking, amongst other things, the administrative remedy exhaustion doctrine, peer review immunity and state actor issues. As the Court can see, that as a matter of law, Sharda has sufficiently plead facts that are ripe for adjudication, well outside of the proffered immunities and invoking state actor status to the private hospital.

II. LEGAL ARGUMENT

Federal jurisprudence mandates that complaints conform with its liberal notice pleading standards. As this Court has previously stated:

> Under notice pleading rules, we require only "a short and plain statement" of the grounds for jurisdiction and the claim for relief. Fed.RCiv.P. 8(a)(1), (2); see also *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955,1964-65,167 L.Ed.2d 929 (2007). We do not impose a heightened pleading standard in the absence of "an explicit requirement in a statute or federal rule,"

Reyes v. BAC Home Loans Servicing, LP (D. Nev., 2011). Moreover, "[t]o overcome a demurrer, a plaintiff need only plead facts that show he may be entitled to some relief." *Id* (internal citations omitted). In effect, the liberal pleading standards of this Court, merely require that Sharda identify actions taken by the enumerated defendants that would give rise to potential relief.

As it stands, Moving Defendants attempt to add evidence outside of the pleadings yet retain the standards of a Motion to Dismiss rather than a Motion for Summary Judgment. In support of their proposition, they cite to *Hal Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1542 (9th Cir. 1990); *Durning v. First Boston Corp.*, 815 F.2d 1265 (9th 1987); and *Sprewell v. Golden State Warriors*, 266 F.3d 979 (9th Cir. 2001). Unfortunately, none of this authority allows Moving Defendants to introduce evidence outside of the Amended Complaint, and the instant motion must be analyzed as one for summary judgment. Accordingly, Moving Defendants must prove that there are no issues of material fact for this Court to grant the requested relief.

a. ADMINISTRATIVE REMEDIES

i. Standard of Review

First and foremost, Defendants' claim for failure to exhaust all administrative remedies is clearly an issue of fact not law, and lies outside of the purview of this Motion to Dismiss. Defendants write "Dr. Sharda has utterly failed to provide Sunrise Hospital with his availability for either the fair hearing or the pre-hearing conference." Pg. 12. In support of their claim, Defendants point to the following authorities: *Eidelson v. Archer* (order reversing "appellants' motion for summary judgment"); *Westlake Community Hosp. v. Superior Court* (order issuing writ of mandamus to vacate trial court's denial of "defendants' motion for summary judgment with respect to revocation of plaintiff's staff privileges"); *Soentgen v. Quain & Ramstad Clinic* (Court ruled "summary judgment against Soentgen is affirmed"; and *Nemazee v. Mt. Sinai Medical Ctr.* (Court allowed motion to dismiss because "trial court has authority to consider any pertinent evidentiary materials when determining its own jurisdiction."). As it appears, exhaustion of administrative remedies should remain an issue of fact not law for purposes of adjudication.

ii. Sharda Exhausted His Administrative Remedies

Contrary to the Moving Defendants' factual allegations, which again are subject to discovery as instances of disputes of material fact, Sharda has exhausted his administrative remedies. Sharda's Amended Complaint clearly alleges that there is a history of undue delay in the administration of his privileges. On multiple occasions, Sharda through his counsel at the time, Stan Johnson, Esq., repeatedly attempted to meet the unduly burdensome requests by Sunrise Hospital to provide requested documentation in connection with Medical Board investigations and issues with Medicare billing. Attached hereto as **Exhibit 1** is a letter dated September 21, 2015, wherein Stan Johnson, Esq. unequivocally acknowledged and provided documentation responsive to the Medical Board's request. In addition, soon after submitting the request for Fair Hearing documentation and receiving a response from Sunrise Hospital, Mr. Johnson contacted Sunrise Hospital repeatedly to set a reasonable time for the hearing. However, his attempts were met with silence and insincere letters from Sunrise Hospital stating they never heard from Mr. Johnson. Attached hereto as **Exhibit 2** is a Declaration of attorney Stan Johnson, Esq. wherein he clearly states that he attempted to schedule a date but was completely ignored by Sunrise Hospital. Such behavior by Sunrise Hospital is indicative of the series of bad faith actions the actor was engaged in as alleged in the Amended Complaint. The Sunrise Hospital ByLaws, as attached in Moving Defendants' Motion, clearly and concisely state that a Fair Hearing would be set within a reasonable time. As admitted by the Moving Defendants, Sharda's latest request for privileges was submitted on October 21, 2015. The request for his Fair Hearing was made on February 23, 2016, almost a year ago, and as of today, Sunrise has yet to set a hearing date or contact Sharda's current counsel to even attempt to set a date for hearing. Justice delayed is no justice at all, and it is telling that Moving Defendants are quick to provide self-serving correspondences rather than testimony to this Court, under penalty of perjury, that Sharda's counsel never contacted them.

iii. Sharda Falls Within an Exception to the Exhaustion of Administrative Remedies Rule

If this Court is inclined to believe that Sharda had not exhausted all of his administrative remedies, because he has yet to actually have a Fair Hearing, regardless of the bad faith obtacles placed by Sunrise Hospital; then there are two exceptions to the Exhaustion Doctrine that are applicable to the instant matter: irreparable harm and futility.

If exhaustion of administrative remedies will result in irreparable harm, the courts may properly exercise their jurisdiction in order to provide relief. *Houston Fed'n of Teachers, Local 2415 v. Houston Indep. Sch. Dist.*, 730 S.W.2d 644, 646 (Tex. 1987). In *Houston Federation*, the plaintiff teachers sought to prevent the extension of the school day. The Supreme Court of Texas believed that the matter was ripe for adjudication even without exhaustion of all administrative remedies due to the potential of irreparable harm. The

Supreme Court of Texas believed that since the Commissioner of Education was unable to authorize immediate injunctive relief, that is, prevent the extension of the school day, the teachers would be irreparably harmed as the damage would occur regardless of the decision by the Commissioner. Similar to *Houston Federation*, the decision to reinstate Sharda's privileges does not necessitate that Sunrise Hospital withdraw the improper trespass violation recorded with the National Practitioners Data Bank.

"Irreparable harm cannot be 'economic injury alone . . . because such injury can be remedied by a damage award.' However, the Ninth Circuit has recognized 'intangible injuries,' which constitute irreparable harm." *Organogenesis Inc. v. Ness* (D. Nev., 2016) (internal citations omitted). Sharda has suffered immeasurable harm to his reputation as a result of the maliciously recorded NPDB complaint. *NPDB Complaint* attached hereto as **Exhibit 3**. This has caused a multitude of issues to Sharda. First and foremost, it puts an unnecessary strain on Sharda's professional relationships with fellow practitioners and Sunrise Hospital staffers. This strain results in loss of business as Sharda's peers refuse to refer patients to him and loss of goodwill as Sharda's reputation remains challenged. Indeed, the type of harm Sharda currently suffers has been previously noted by this Court when it stated:

> The risk of erroneous deprivation is substantial. Because hospitals report suspensions to the NPDB, "an improper suspension would have dramatic consequences for the physician," who may be unable to practice nationwide based on a mistaken report." *Williams v. Univ. Medical Ctr. of Southern Nevada*, 688 F. Supp.2d 1111, 1127 (D. Nev., 2010) (internal citations omitted).

Although Sharda is equipped to continue his practice without Sunrise Hospital privileges, he is extraordinarily disadvantaged in the market. Moreover, Sunrise Hospital's NPDB complaint has caused significant issue with Sharda's insurance providers. Attached hereto as **Exhibit 4** is a September 14, 2016 letter by AMERIGROUP that demands that Sharda explain the "Clinical Privileges action taken 1/21/2016 for Practicing Beyond the

Scope of Privilege resulting in License Revocation." Sharda's reputation has been harmed and he has lost countless business to the point that financial collapse may occur. Section 5.7 of the Medical ByLaws provided by Moving Defendants only shows that Sunrise must report adverse decisions to Sharda's privileges to the NPDB and not the reverse. Ultimately, unless the Moving Defendants prove that there is an administrative mandate that the decision to reinstate Sharda requires that Sunrise Hospital immediately remedy the wrongfully recorded NPDB trespass, Sharda is entitled to circumvent the administrative procedure due to irreparable harm.

In addition to irreparable harm, a party is not required to exhaust administrative remedies if it would be futile to do so. *Ogletree v. Glen Rose Indep. Sch. Dist.*, 314 S.W.3d 450, 454 (Tex. App.—Waco 2010, pet. denied). In the instant matter, although the Fair Hearing requirements gives Sharda the ability and theoretical potential to reverse the privileges decision, Moving Defendants' actions clearly show an intent to deprive Sharda without fair process. Sharda has very limited chances to receive a fair and impartial hearing considering Sunrise Hospital believes the apparent trespass to be irredeemable. It is easy to see the hostility Sunrise Hospital holds against Sharda in its unfounded December 18, 2015 Cease and Desist letter attached hereto as **Exhibit 5**.[1] Accordingly, unless directed by this Court to disregard the alleged trespass during his Fair Hearing, Sharda's request will simply end in denial by Sunrise Hospital. The administrative hearing would be nothing but a sham and the result would be the continued deprivation of privileges and negative NPDB reports.

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[1] The fact that Sunrise Hospital invited Sharda to the hospital and then unfairly chastised him after is discussed Infra.

b. HCQIA IMMUNITY

Moving Defendants cloak themselves under HCQIA Immunity stating that they have a rebuttable presumption for conducting their peer review process. However, there is no reason to apply HCQIA Immunity when the Moving Defendants have acted in the manner alleged in the Amended Complaint. To receive the benefits of HCQIA immunity:

> [t]he peer review action must be an action made: (1) in furtherance of quality health care; (2) after a reasonable effort to obtain the facts in the matter; (3) after adequate notice and hearing; and (4) in the reasonable belief that the action was warranted based on the facts known.

Meyer v. Sunrise Hosp., 22 P.3d 1142, 117 Nev. 313 (Nev., 2001) (internal citations omitted). Moving Defendants have attempted to conflate the facts and procedures of this matter in an effort to receive blanket immunity. The instant lawsuit is **partly** based on the fact that Sharda was denied privileges in January 2016. However, the lawsuit is also based on the fact that Moving Defendants have acted in a manner that unreasonably delayed Sharda's Fair Hearing appeal rights. These two issues are wholly distinct and must be considered separately by this Court. By the facts of the Amended Complaint, Moving Defendants did not act in a manner consistent with the four immunity factors and dismissal is not warranted. Even if this Court somehow applies HCQIA immunity to Moving Defendants, it is cannot be applicable due to the unreasonable delay in setting Sharda's Fair Hearing.

1. There was no good faith belief that Sunrise Hospital was acting in furtherance of quality health care.

With regard to the January 2016 privileges denial, Moving Defendants argue that their decision was based on the adverse actions taken by the Nevada Medical Board; a settlement between Sharda and the U.S. Department of Justice for Medicare billing; and that Sharda provided medical advice to a Sunrise inpatient when he did not have privileges. However, nothing in the actual NPDB report nor in the January 20, 2016 denial letter, state how Sharda had acted in any manner that would hurt or hinder patient care. Indeed, the only arguable statement in either document that Sharda was adversely affecting quality health care was the reference to his visit to Sunrise Hospital when he was not credentialed. However, as stated on multiple occasions, Sharda was indeed invited to the hospital at that time by an agent of Sunrise Hospital. Attached hereto as **Exhibit 6** is a text message from the Sunrise Hospital Hospitalist, Dr. Arrastia, sent on December 13, 2015 asking Sharda to come to the hospital to see the patient. It is ridiculous to invite Sharda to the hospital and then penalize him for doing his job. Citing this trespass during the peer review process could not have been done in furtherance of quality health care and this notion must be dispelled entirely.

2. There was no reasonable effort to obtain facts during the peer review process.

Moving Defendants' claims that Sharda did not provide information requested from him is categorically false. As evidenced from the previous letter by Stan Johnson, Esq., Sharda had provided the documentation to Moving Defendants by the time of their January 2016 denial. Exhibit 1. Indeed, the actual NPDB Complaint does not state the Sharda did not provide requested information. Exhibit 3. In addition to the fact that Moving Defendants are clearly misrepresenting to the Court that they did not receive information from Sharda, Moving Defendants also neglect to mention how they investigated the December 2015 visit. As shown in the Cease and Desist Letter, Sunrise Hospital does not state that it will investigate the facts surrounding the visit. Exhibit 5. Instead, the Cease and Desist Letter is punitive and conclusory in nature, simply assuming Sharda's conduct was wrongful and that it would be reported to the credentialing committee and the Nevada State Board.

3. The was no adequate notice.

This Court needs to look no further than its decision in *Chudacoff v. Univ. Med. Center of Southern Nevada* to see that the Moving Defendants failed to provide adequate notice to Sharda. *Chudacoff v. Univ. Med. Center of Southern Nevada*, 609 F.Supp.2d 1163 (D. Nev., 2009). In *Chudacoff*, the plaintiff doctor had filed a motion for partial summary judgment arguing that the defendants had violated his due process rights "by suspending his hospital privileges and then reporting that suspension to the NPDB without notice or an opportunity to be heard." *Chudacoff* at 1171. This Court found that "for HCQIA immunity to apply, the notice given to the physician must state that a review action is going to take place in the future. It is not sufficient for the physician to be told, after the fact, that a review action has been taken against him already." *Chudacoff* at 1177.

At the very minimum, Sunrise Hospital had to give Sharda the opportunity or notice that his actions would be reviewed. However, instead of giving Sharda notice and the opportunity to explain his actions before being reported, Sharda was sent a letter by Sunrise Hospital CEO Todd P. Sklamberg stating that his recent visit to the hospital would also be included in his then upcoming Request for Consideration hearing and that it would be reported to the Nevada Medical Board. Exhibit 5. The Cease and Desist makes no mention as to when the trespass will actually be discussed. Then on January 20, 2016, a letter was sent to Sharda stating that on January 5, 2016, less than three weeks after sending the cease and desist, the credentialing committee met and discussed the supposed trespass. See January 20, 2016 letter attached hereto as **Exhibit 7**. To add insult to injury, the January 20, 2016 letter stated that the trespass information would then be forwarded to the Medical Executive Committee **one day later**. Exhibit 7. The facts, as they stand, clearly show that the Moving Defendants provided little to no effective notice to Sharda, purposefully omitted when the matters would be heard, and provided no ability for Sharda to at least attempt to explain the December 2015 visit.

4. There was no reasonable belief that corrective action was warranted.

Based on the mere fact that Moving Defendants have acted in complete bad faith in deciding Sharda's credentialing in January 2016, there cannot be a reasonable belief that corrective action would be necessary.

c. STATE ACTORS

After reviewing the facts, the Court shall find state action in the instant matter. Sunrise Hospital conspired with state officials and conducted actions characteristically exercised by the state.

i. Sunrise Hospital acted in concert with a state actor, the Nevada State Board of Medical Examiners or its members.

Nevada federal jurisprudence ascribes state action status to private parties when the party works in concert with a state official. This Court has once stated:

> [a] person may become a state actor by conspiring with a state official, or by engaging in joint activity with state officials… The joint action test requires a private party to be a "willful participant" with state actors, and the private party's actions must be "inextricably intertwined" with the state actors' actions in an activity that deprives an individual of his constitutional or federal rights…To be considered an act of joint activity with the state, the private actor needs to have some control over the state actors' decision making. …

Ward v. Waldron (D. Nev., 2012) (internal citations omitted). Accordingly, this Court may grant relief to Sharda if it finds that Sunrise Hospital acted with a state actor to hinder or damage Sharda. In this case, the Nevada State Board of Medical Examiners, as a state regulatory board created by Nevada legislation, operates as the state actor.[2] Sharda alleges that Sunrise Hospital, by and through its agent, Reisinger acted in concert with the Nevada State Board of Medical Examiners to hinder Sharda's medical practice. Reisinger as a chief physician of Sunrise, acted in a managerial role in the administration of the oncology services provided at Sunrise. Accordingly, this Court should find that Reisinger is an administrator and agent of Sunrise Hospital and that Sunrise Hospital, as her principal, is vicariously liable for the conduct between Reisinger and the Nevada State Medical Board of Examiners.

"An agent's authorized, as well as unauthorized but ratified, acts are imputed to its principal." *3685 San Fernando Lenders, LLC v. Compass USA SPE LLC (In re U.S.*

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[2] The Ninth Circuit generally finds that state board of examiners are state actors for the instant purposes. *See Aasum v. Good Samaritan Hospital*, 542 F.2d 792 (C.A.9 (Or.), 1976) (Finding state action when a private hospital acted at the behest of the Oregon Board of Medical Examiners).

Commercial Mortg. Co.), 802 F.Supp.2d 1147, 1160 (D. Nev., 2011) (internal citations omitted). Moreover, employers can be "vicariously liable for the tortious conduct of its employees when the employees' conduct was in furtherance of their employment or within the scope of their employment." *Peterson v. Miranda*, 57 F.Supp.3d 1271 (D. Nev., 2014) (internal citations omitted).

Sharda complains and alleges that Reisinger conspired with Defendant Desai wherein the two would stifle competition in the oncology community in Clark County and reap the financial benefits. Desai, who was a prominent physician and member of the Nevada Medical Board of Examiners, had clout with the Board and would utilize this to his advantage. The plan, as alleged by Sharda, was for Reisinger and Desai to initiate investigation after investigation by the Board as against Sharda. To initiate such an investigation, Reisinger along with her confederates, would simply lodge standard complaint forms against Sharda with the Board. Utilizing its powers as mandated by the Nevada Legislature, the Board would set the inquiry with the Investigative Committee of the Nevada State Board of Medical Examiners. These frequent investigations are disruptive to Sharda's practice and the sources of the triggering complaint are kept confidential. While many investigations ultimately ended in closure without action, a handful continued to formal investigations. The following case numbers represent the investigations ending in disciplinary actions as against Sharda: 13-11856-1&2; 12-11856-1; 10-11856-1; and 08-11856-1.[3] It is important to note that no patient

[3] This matter was appealed to the Eighth Judicial District Court of Nevada for judicial review in case number A-10-612556-J; wherein the Court eliminated the Board's original order which stated that Sharda failed to follow-up with a biopsy. The modified order, as pursuant to the Court's ruling, only shows a failure of proper medical records violation.

harm has been found in any of these investigations. Each disciplinary investigation merely related to failure to keep proper medical records.

As discussed earlier, Reisinger is the Chief of Oncology at Sunrise Hospital. As the Chief of Oncology, she acts an agent of Sunrise when determining the ongoing oncology services administered at Sunrise Hospital. This includes vetting oncologists such as Sharda in the clinical privileges screening process. As alleged in the Amended Complaint, going as far back as November 2011, Reisinger had blatantly refused to recommend or approve staff membership to Sharda during his clinical privileges applications. Although Reisinger's refusal to sign off on Sharda was the result of her alleged tortious enterprise with the other defendants, these actions ultimately resulted in Reisinger utilizing her authority to stifle Sharda's clinical privileges approval. As a result, Reisinger's actions against Sharda were done in furtherance or within the scope of her employment with Sunrise Hospital considering Reisinger's role as administrator was to staff Sunrise Hospital with local licensed oncologists.[4]

ii. Sunrise Hospital functioned in the state's capacity regarding its management of the emergency oncologist practice.

Regardless of Sunrise's actions with state actors, this Court can also find that Sunrise Hospital, while a private institution, acted in the capacity of the state. This Court has previously written that the three factors to determine state action are:

> (1) whether there is a "sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself;" (2) whether the state "has exercised coercive power or has provided such significant encouragement, either overt or

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[4] Another example that shows Sunrise Hospital's ratification of inappropriate behavior against Sharda is the December 13, 2015 visit of "Patient X." As argued earlier, Sharda was invited to Sunrise Hospital by Hospitalist Dr. Arrastia. However, the December 18, 2015, Cease and Desist letter issued by Sunrise's Chief Executive Officer Todd P. Sklamberg shows an unmistakable ratification by Sunrise Hospital to hinder Sharda's practice.

> covert, that the choice must in law be deemed to be that of the State;" (3) whether "the private entity has exercised powers that are 'traditionally the exclusive prerogative of the State.'"

Wong v. Dep't of Health & Human Servs. (D. Nev., 2011) (internal citations omitted).[5] The instant matter meets these thresholds due to this pertinent fact: that Sharda maintained an Emergency Radiation Therapy Contract through Sunrise Hospital.

Unlike other cases wherein physicians sue private hospitals for 14th amendment violations and merely assert state action as a result of the institutions receiving Hill-Burton funds; Sunrise Hospital has acted as the gatekeeper to state and federal assets.

As alleged in the Amended Complaint, Sharda maintained a contract with Sunrise Hospital to give emergency care to Medicare patients at Sunrise for an indefinite and ongoing basis. Upon information and belief, Sunrise Hospital lacks onsite Radiation Oncology resources. In order to maintain a lucrative contract with Medicare, Sunrise Hospital was delegated responsibility by Medicare to resolve this deficiency in Sunrise's ongoing oncology practice. Sunrise Hospital resolved this deficiency by contracting with Sharda. Presumably Sunrise Hospital does not have unfettered discretion in selecting the physicians to take the Emergency Radiation Therapy Contract.[6] As a government agency, Medicare sets the criteria and Sunrise must accommodate. If at any time, Medicare deems a physician inappropriate to offer such services, Sunrise Hospital is under an obligation to investigate the physician and terminate the ongoing services contract.

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[5] While this standard is indeed stringent and this Court is typically not inclined to grant state actor status to private hospitals, the 2013 decision by this Court in *Cunningham-Dirks v. Nevada* shows the standard is not impossible to overcome.

[6] Again, this is a matter that requires discovery.

Accordingly, with respect to Sharda, Sunrise Hospital has indeed taken the place of the state. As the gatekeeper to government contracts and funds, Sunrise Hospital is in the unique position of determining who may or may not receive government funds paid directly by the government. More importantly, by having extremely limited input as to Medicare's final decision on appointing contracts to physicians, Sunrise Hospital is merely an extension of the government for purposes of the Emergency Radiation Therapy Contract selection process and as such, becomes a state actor.

d. ANTI-TRUST

For purposes of Sherman Act section 1 analysis:

> a plaintiff must demonstrate three elements: (1) an agreement, conspiracy, or combination among two or more persons or distinct business entities; (2) which is intended to harm or unreasonably restrain competition; and (3) which actually causes injury to competition, beyond the impact on the claimant, within a field of commerce in which the claimant is engaged (i.e., "antitrust injury").

McGlinchy v. Shell Chem. Co., 845 F.2d 802, 811 (9th Cir. 1988). Sharda's Amended Complaint satisfies these standards as he alleged: (1) multiple parties came together to utilize their individual powers to eliminate medical practitioners who do not conform with the their goals; (2) that the intent of this ongoing conspiracy was to limit the amount of medical competitors by preventing their ability to take in new patients through a massive patient intake/referral source (i.e. the hospital); and (3) directly injured competition in the market place, at least with regard to oncologists. Sharda has alleged a plausible agreement between the parties in that parties such as Reisinger and Desai agreed to share economic benefits amongst each other by unjustly restraining competing medical practitioners in the marketplace. Sunrise Hospital financially benefited from these acts and acted to facilitate rejection of privileges of practitioners such as Sharda. The fact that Sunrise Hospital employed its peer review system to hinder Sharda is not an example of "parallel conduct" but a testament to Sunrise Hospitals' sophisticated knowledge of how to "legally" stymie competitive behavior by taking advantage of the numerous immunities granted to the peer review process.

Under the liberal notice pleadings of federal jurisprudence, Sharda has certainly made the Moving Defendants aware of the actions demonstrative of anti-competitive behavior and liability. However, the First Amended Complaint has admittedly fallen short of specific pleading requirements such as the statement of a "relevant market" and injury to competition rather than just Sharda specifically. Accordingly, Sharda respectfully requests that this Court grant leave to Amend the Anti-Trust cause of action to satisfy the pleadings requirements of anti-trust injury and related information.

e. TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS

Moving Defendants' request to dismiss the claims for tortious interference with contractual relations is without merit. As the Amended Complaint stands, the Moving Defendants knew or had reason to know of Sharda's ongoing contracts with his professional insurers, other hospitals, and the emergency Radiation Therapy contract due to the credentialing process. The conspiracy, as alleged, states that the Moving Defendants, in an effort to hinder market competition for their own benefits, acted to restrain and alienate Sharda's medical practice. As a result of the multiple actions taken by defendants, resulting in the denial of Sharda's privileges and an unreasonable delay in granting his Fair Hearing, Sharda has been damaged financially. Sharda has met his burden under notice pleading standards. Moving Defendants have many issues of fact to contend with, that are outside of the realm of a motion to dismiss.

The only plausible claim for judgment as a matter of law, would be the immunity offered by HCQIA. However, such immunity is only applicable to the January 2016 consideration denial and not the damages caused by the unreasonable delay in the Fair Hearing process. Moreover, as argued earlier, Moving Defendants cannot avail themselves to HCQIA protections considering their bad faith.

f. EXISTENCE OF A CONTRACT

Regardless of the language of the Bylaws that state "NO CONTRACT INTENDED" there is clearly a contract as between Sharda and Sunrise Hospital. Moving Defendants rely on outside jurisdictions to argue that because there is a preexisting duty for a hospital to enact bylaws, contract formation is impossible due to want of consideration. Such argument is unreasonable as there is no duty for a hospital to grant privileges to any individual practitioner. *See Gianetti v. Norwalk Hosp.*, 557 A.2d 1249, 1254 (Conn. 1989) ("It can hardly be said that the hospital must extend privileges to every physician who seeks them."); *Virmani v. Presbyterian Health Servs. Corp.*, 488 S.E.2d 284, 288 (N.C. Ct. App. 1997) ("When, however, a hospital offers to extend a particular physician the privilege to practice medicine in that hospital it goes beyond its statutory obligation."). Ultimately, Sunrise Hospital and Sharda chose to work with each other at one point in time when both were under no legal obligation to do so. This promise is certainly adequate consideration for purposes of contract formation.

However, even if there is no adequate consideration, the doctrine of estoppel is clearly implicated in the matter. Equitable estoppel is a remedy at equity that bars a party from raising the statute of frauds as a defense. In Nevada, the elements for equitable estoppel are: 1) the party relying on estoppel must be influenced by the acts or silence of the other; and 2) it must appear that the acts or conduct of the party estopped caused the party relying to act as he would not have acted. *Edwards Industries, Inc.*, 112 Nev., 1025 at 1033 and *Zunino v. Paramore*, 83 Nev. 506, 509 (Nev., 1967). At the very minimum, Sharda and Sunrise entered an agreement whereby Sharda was allowed to apply for clinical privileges so long as Sunrise followed its Bylaws, which includes providing and executing a fair appeal process.

Considering any denials of clinical privileges at a hospital must be reported to the NPDB[7], the fact that Sharda does not maintain current active status with Sunrise Hospital is irrelevant. Sharda, relying on the representation of Sunrise Hospital, submitted his application, was denied in January, received an unjust NPDB filing, and has been unreasonably delayed in his Fair Hearing process. There is clearly a contract between the parties as a matter of law.

g. EXISTENCE OF A CONSPIRACY

Moving Defendants claims that the underlying agreement between the parties is not plausible. However, this is an issue of fact and cannot be adjudicated in a motion to dismiss. Moving Defendants claim that the 2001 refusal of Desai's offer and the actions taken in 2015 are so far part that no conspiracy is plausible. This is clearly a matter of fact that requires additional discovery. As it stands, Sharda alleges that at some point after 2001, Reisinger accepted the same or similar offer by Desai. Sharda, without the benefit of discovery, cannot adequately state the exact moment the defendants began their enterprise. Because plausibility is an issue of fact at this moment, the trier of fact must be given more information and Sharda's claims should survive a motion to dismiss.

With regard to the single entity status of Sunrise Hospital and its inability to conspire with its employees, Sharda concedes that if this Court agrees with the *Buckner* court, in that a hospital cannot conspire with its own agents, then there cannot be a conspiracy between Sunrise Hospital and Reisinger and Keeley. However, at the same time, due to the fact that "the hospital is viewed as a single entity acting though its staff" the conspiracy between Sunrise Hospital (acting through Reiner and Keeley), Desai and the Board must stand at this stage of litigation. *Buckner, M.D. v. Lower Florida Keys Hosp. Dist.*, 403 So. 2d 1025, 1029 (FLA. Ct. App. 1981).

III. CONCLUSION

For the foregoing reasons, Sharda respectfully requests that this Court deny Moving Defendants' Motion to Dismiss in its entirety, or at the minimum, grant Sharda leave to amend

[7] See NPDB guidebook printout attached as **Exhibit 8**

to file an Amended Complaint that satisfies any pleading deficiencies that this Court recognizes and open discovery for Sharda to begin his formal investigation.

Dated this 16th day of February, 2017.

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